

## European Union Citizenship - The Pitfalls of a Fundamental Status

European Union citizenship was introduced by the Treaty of Maastricht in 1992 and is currently held by approximately 500 million people. In 2001, the European Court of Justice (hereinafter: ECJ or Court) famously held in *Grzelczyk* that “Union citizenship is destined to be the fundamental status of nationals of the Member States”.<sup>1</sup> This article aims to contribute to the ongoing debate regarding the shift in the Court’s case law on EU citizenship,<sup>2</sup> by exploring whether EU citizenship can still be considered as the fundamental status of every citizen of the European Union or whether some EU citizens are excluded from this status and the rights associated therewith. This question is discussed against the background of the inherently open notion of integration and against two principles of the *Rechtsstaat*, one being the principle of legal certainty and the other being the principle of proportionality. The notion of integration and the principle of proportionality share common features as they are open-ended, require an assessment of the facts of the individual case and are therefore not conducive to establishing legal certainty.

This article addresses the Court’s recourse to the respective concepts and the effects of the application of these concepts on EU citizenship. It is argued that the Court’s recourse to the principle of legal certainty is used to forego a proportionality assessment. The lack of a proportionality assessment and thereby a lack of an assessment of the facts of the individual case and a balancing process, disadvantages specific groups of EU citizens. In other areas of citizenship law, the Court establishes the requirement of an assessment of the EU citizen’s integration in the host Member State. This approach, however, has the effect of undermining legal certainty and furthers the exclusion of EU citizens from the protection against expulsion or the acquisition of permanent residence status. The ECJ’s recourse to the principle of legal certainty or the concept of integration enhances Member States’ sovereignty, their margin of discretion vis-à-vis EU citizens and weakens the legal position of EU citizens.

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<sup>1</sup> Case C-184/99, *Grzelczyk*, EU:C:2001:458, para. 31. Similarly Recital 3 of the Preamble to the Citizenship Directive provides: “Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence”.

<sup>2</sup> See specifically, *N. Nic Shuibhne*, “Limits rising, duties ascending: The changing legal shape of Union citizenship”, 52 CMLRev. (2015), pp. 889; *D. Thym* “The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens”, 52 CMLRev. (2015), pp. 17; *E. Spaventa*, “Earned Citizenship – Understanding EU Citizenship through Its Scope”, in: D. Kochenov (ed.), *EU Citizenship and Federalism, The Role of Rights*, Cambridge, Cambridge University Press, 2017, pp. 204.

## I. Introduction

Shortly after the introduction of EU citizenship in 1992, the European Court of Justice (hereinafter: ECJ or Court) breathed life into this concept and became the driving force behind its development. In the late 1990s and at the beginning of the millennium, the ECJ steadily increased and strengthened the rights of EU citizens and their family members, often with recourse to the principle of equal treatment stipulated in Article 18 TFEU. In this so-called 'constituent phase',<sup>3</sup> the Court often gave a broad interpretation of the rights granted to EU citizens while interpreting the limits of the rights restrictively.

EU citizenship has enabled its holders to rely on equal treatment with nationals of the respective state, for example when asking for child raising allowance (*Martínez Sala*),<sup>4</sup> subsistence allowance (*Grzelczyk*)<sup>5</sup> or social assistance (*Trojani*).<sup>6</sup> These, as well as other judgments, were considered to detach EU citizenship from its market logic,<sup>7</sup> and were held to stress the "aspirational vocation of equal citizenship".<sup>8</sup> Principles that were established in the initial phase of citizenship case law were subsequently codified in Directive 2004/38 (hereinafter: the Citizenship Directive),<sup>9</sup> which marked the phase of consolidation.<sup>10</sup> In this phase, the Court refined previously established principles and developed new strands of its citizenship case law. According to Iliopoulou-Penot, the Court's focus rested more on the social integration of EU citizens rather than on their productivity and contribution to the prosperity of the host society.<sup>11</sup>

Considering the continuous strengthening of EU citizens' rights and the aim of an ever-closer Union among the peoples of Europe,<sup>12</sup> one might have expected a further enhancement of the rights of EU citizens. However, in recent years the opposite direction seems to prevail and the

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<sup>3</sup> E. Spaventa (Fn. 2), p. 207.

<sup>4</sup> Case C-85/96, *Martínez Sala*, EU:C:1998:217. Here, it was held that a Spanish citizen's claim for child raising allowance could not be refused by the German authorities on the basis of the lack of a residence permit, as German nationals did not have to fulfil this requirement to be eligible for the allowance.

<sup>5</sup> Case C-184/99, *Grzelczyk*, EU:C:2001:458.

<sup>6</sup> Case C-456/02, *Trojani*, EU:C:2004:488.

<sup>7</sup> F. Strumia, "Looking for Substance at the Boundaries: European Citizenship and Mutual Recognition of Belonging", 32(1) Yearbook of European Law (2013), p. 459.

<sup>8</sup> D. Thym, "Frontiers of EU Citizenship: Three Trajectories and Their Methodological Limitations", in: D. Kochenov (ed.), *EU Citizenship and Federalism, The Role of Rights*, Cambridge, Cambridge University Press, 2017, pp. 717-719.

<sup>9</sup> Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, O.J. 30.04.2004, L 158, p. 77 (hereinafter the 'Citizenship Directive').

<sup>10</sup> E. Spaventa (Fn.2), p. 208.

<sup>11</sup> A. Iliopoulou-Penot, "Deconstructing the former edifice of Union citizenship? The *Alimanovic* judgment", 53 CMLRev. (2016), p. 1021.

<sup>12</sup> Preamble to the Treaty on European Union.

fundamental status of Union citizenship seems to be fading away, especially for those who are economically inactive or not sufficiently economically active, who lack sufficient financial resources or do not comply with the (criminal) laws of the host Member State. Spaventa describes the Court's more recent approach to EU citizenship as a "reactionary phase"<sup>13</sup> and Thym observes that the case law exhibits a "doctrinal conservatism".<sup>14</sup> He argues that the "promise of equality does not embrace all those holding the status".<sup>15</sup>

However, it should be noted from the outset that the aforementioned *Grzelczyk* formula always had two components. The full paragraph of the Court's judgment reads: "Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for".<sup>16</sup> While the first two phases of the ECJ's case law on citizenship seem to embody the first part of the formula, the current phase reflects the second part of the formula by focusing more on the limitations. These limitations and exceptions to the right to move and reside freely are also provided for in Article 21 TFEU, but the Court has repeatedly clarified that "those limitations and conditions must be applied in compliance with the limits imposed by Community law and in accordance with the general principles of that law, in particular the principle of proportionality".<sup>17</sup>

The first part (1.) of this article sets the scene by providing a brief overview of the different directions the Court's case law on EU citizenship has taken in the last couple of years. The second part (2.) addresses the Court's case law regarding EU citizens' access to non-contributory cash benefits and analyses the noticeable jurisprudential shift undertaken by the Court. The difference in the judgments regarding social benefits is characterised by an increasing reliance on the principle of legal certainty, which provides the Court with a justification for departing from the principle of proportionality. While the principle of proportionality, which involves a balancing of the conflicting interests, is not conducive to legal certainty as the outcome of the balancing process is not predictable, it is nevertheless a general principle of Union law and must be respected by the Unions' institutions. The shift from the principle of proportionality to the principle of legal certainty has the effect of excluding certain EU citizens from access to social benefits. The third part (3.) briefly explores the right of residence of third-country family members upon return to the EU citizen's home Member State. This part exhibits parallels to the second part as it seems to be governed by a similar approach in that the Court has relied – implicitly – on legal certainty and abstained from

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<sup>13</sup> E. Spaventa (Fn. 2), pp. 208, 209.

<sup>14</sup> D. Thym, "When Union citizens turn into illegal migrants: the Dano case", 40 E.L. Rev. (2015), p. 252.

<sup>15</sup> Ibid., p. 261.

<sup>16</sup> Case C-184/99, *Grzelczyk*, EU:C:2001:458, para. 31.

<sup>17</sup> Case C-413/99, *Baumbast and R.*, EU:C:2002:493, para. 91; Case C-456/02, *Trojani*, EU:C:2004:488, para. 34.

conducting a proportionality assessment. In the fourth part (4.), the notion of integration is briefly introduced and two different functions that can be assigned to this concept will be highlighted. The fifth part (5.) outlines the case law regarding the acquisition of the right of permanent residence and critically assesses the Court's recourse to the notion of integration. The Court has linked the acquisition of the right of permanent residence to the notion of integration and has turned integration into a requirement that the foreigner must fulfil. It is argued that this not only militates against the function attached to the notion of integration in the context of the Preamble of the Citizenship Directive, but that it also excludes certain EU citizens from acquiring the right of permanent residence. The sixth part (6.) focuses on EU citizens' protection against expulsion which is similar to the approach adopted by the Court that was outlined in the fifth part as it relies on the notion of integration, which the Court argues underpins the protection against expulsion. Finally, the effects of the Court's recourse to the notion of integration, the principle of proportionality and the principle of legal certainty on EU citizenship are summarised in the concluding remarks (II.)

## **1. Different directions of the Court's case law on EU citizenship**

The different phases outlined in the introduction (I.), serve only as indications and must not hide the fact that the Court's case law on EU citizenship is neither homogeneous nor linear<sup>18</sup> and that the Court does not hold a uniform concept of EU citizenship.<sup>19</sup> It rather reflects a dialogue between the ECJ and national courts<sup>20</sup> whereby the Court invites national courts to initiate further debate by reacting to its judgments. The subsequent section shall briefly highlight selected judgments on EU citizenship in different areas and demonstrate that the Court does not follow a linear approach, but rather a combination of different approaches.

The *Tsakouridis* judgment of November 2010 concerned an EU citizen's protection against expulsion. Mr Tsakouridis had resided for more than ten years in Germany and could therefore only be expelled on imperative grounds of public security.<sup>21</sup> The ECJ departed from its previous interpretation of public security,<sup>22</sup> and adopted a wider definition of this notion.<sup>23</sup> By allowing for such a broad definition of public security, the Court increased the power of

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<sup>18</sup> P. Hilpold, "Die Unionsbürgerschaft – Entwicklung und Probleme", EuR 2015, p. 135.

<sup>19</sup> D. Thym (Fn. 2), p. 33.

<sup>20</sup> See, T. Tridimas, "The ECJ and the National Courts, Dialogue, Cooperation and Instability", in: D. Chalmers, A. Arnall (eds.), *The Oxford Handbook of European Union Law*, Oxford, Oxford University Press, 2015, pp. 403.

<sup>21</sup> Article 28(3)(a) of the Citizenship Directive.

<sup>22</sup> Case C-367/89, *Aimé Richardt and Les Accessoires Scientifiques SNC*, EU:C:1991:376, para. 22; Case C-83/94, *Leifer*, C-83/94, EU:C:1995:329, para. 26; Case C-273/97, *Sirdar*, EU:C:1999:523, para. 17; Case C-423/98, *Albore*, EU:C:2000:401, para. 18; Case C-285/98, *Kreil*, EU:C:2000:2, para. 17, Case C-72/83, *Campus Oil Limited*, EU:C:1984:256, para. 34.

<sup>23</sup> Case C-145/09, *Tsakouridis*, EU:C:2010:708, para. 56.

Member States to remove EU citizens from their territory and weakened the latter's protection against expulsion. The approach adopted in *Tsakouridis* was confirmed one year later in *P.I.*<sup>24</sup>

Contrary to its limiting approach in *Tsakouridis*, the Court strengthened the rights of static minor EU citizens and their third-country carers in *Ruiz Zambrano* only four months later. The *Ruiz Zambrano* judgment confirmed the autonomous meaning of EU citizenship and created a third type of link for a situation to fall within the scope of EU law. Prior to *Ruiz Zambrano* a situation would have to display an inter-state element or be covered by EU legislation in order to fall within the scope of EU law. Tridimas argues that *Ruiz Zambrano* "mark(s) a departure (...) from the internal market model of European integration to a citizenship paradigm".<sup>25</sup> In *Ruiz Zambrano* the Court held "that Article 20 TFEU (...) precludes a Member State from refusing" a third-country national father of static EU citizens, whom are dependent on that third-country national, a right of residence and a work permit "in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen".<sup>26</sup> According to Tridimas, the Court's use of the imprecise and abstract term of "genuine enjoyment of the substance of the rights" invites national courts to initiate further debate through the preliminary reference procedure.<sup>27</sup>

Only two months later, in May 2011, the Court elaborated on the notion of "genuine enjoyment of the substance of the rights" in *McCarthy*<sup>28</sup> and – depending on one's perspective – either retreated from or clarified the *Ruiz Zambrano* judgment. *McCarthy* concerned a dual British and Irish citizen who had always resided in the UK and whom wished to be joined by her spouse, whom was a third-country national. Given that "the national measure at issue (...) does not have the effect of obliging Mrs McCarthy to leave the territory of the European Union"<sup>29</sup> she was held not to be deprived of the substance of her rights. Later in 2011, the approach adopted in *McCarthy* was confirmed in *Dereci*<sup>30</sup> and in the subsequent years in other cases.<sup>31</sup> According to Adam and van Elsuwege this restrictive interpretation of the 'genuine enjoyment test' aims to "avoid impinging upon Member States' autonomy to regulate migration and to preserve the Union legislature's choices in the Citizenship Directive".<sup>32</sup> Moreover, they

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<sup>24</sup> Case C-348/09, *P.I.*, EU:C:2012:300.

<sup>25</sup> T. Tridimas (Fn. 20), pp. 410.

<sup>26</sup> Case C-34/09, *Ruiz Zambrano*, EU:C:2011:124, para. 45.

<sup>27</sup> T. Tridimas (Fn. 20), pp. 409.

<sup>28</sup> Case C-434/09, *McCarthy*, EU:C:2011:277.

<sup>29</sup> *Ibid.*, para. 50.

<sup>30</sup> Case C-256/11, *Dereci*, EU:C:2011:734.

<sup>31</sup> For example, Case C-40/11, *Iida*, EU:C:2012:691; Case C-356/11 and C-357/11, *O, S v. Maahanmuuttovirasto, and Maahanmuuttovirasto v. L*, EU:C:2012:776; Case C-87/12, *Ymeraga*, EU:C:2013:291.

<sup>32</sup> S. Adam and P. van Elsuwege, EU Citizenship and the European Federal Challenge through the Prism of Family Reunification, in: D. Kochenov (ed.), EU Citizenship and Federalism, The Role of Rights, Cambridge, Cambridge University Press, 2017, p. 451.

point out that the use of generic references such as ‘genuine enjoyment’ or ‘the substance of rights’ clearly contributes to legal uncertainty.<sup>33</sup>

Concerning EU citizens’ access to non-contributory cash benefits, the Court rejected any automatic denial of benefits in its *Brey*<sup>34</sup> judgment of September 2013 and required that an assessment of the facts of the individual case and a proportionality assessment be conducted. In contrast to *Brey*, the Court weakened the position of EU citizens’ regarding access to non-contributory cash benefits in *Dano*<sup>35</sup> (2014) and in *Alimanovic*<sup>36</sup> (2015). Whilst the Court focused on a proportionality assessment in *Brey*, the Court eschewed conducting a proportionality assessment in *Dano* and subsequently justified the lack of a proportionality assessment by having recourse to the legal certainty principle in *Alimanovic*. This jurisprudential shift thereby allowed non-contributory cash benefits to be denied, without a proportionality assessment having to be conducted.

Regarding EU citizens’ protection against expulsion, the Court undermined the protection of EU citizens even further in the *M.G.*<sup>37</sup> case of January 2014, by linking the protection against expulsion provided for in the Citizenship Directive to an integration requirement. However, in *Rendón Marín*<sup>38</sup> and *CS*<sup>39</sup> of September 2016, the Court strengthened the rights of third-country nationals who are the primary carers of static, minor EU citizens who are dependent on the third-country national, by emphasising the importance of an assessment of the individual case and a proportionality assessment and by barring an automatic expulsion of the third-country national and the denial of a residence permit respectively.

Strumia correctly states that there might be a risk “that supranational citizenship becomes the fundamental status for a shrinking subset of such people” and that the end result may be that more rights are given to fewer people.<sup>40</sup> However, while she argues that the doctrine of the substance of the rights developed in *Ruiz Zambrano* is an “effort to also protect those who stand at its margins”,<sup>41</sup> this article focuses on those EU citizens who stand at the margins due to their insufficient economic activity or their lack of compliance with criminal laws and whom the Court seems to exclude from some of the rights attached to EU citizenship.

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<sup>33</sup> D. Kochenov, “The Right to Have *What* Rights?”, 19 European Law Journal (2013), p. 512; S. Adam and P. van Elsuwege (Fn. 32), p. 452.

<sup>34</sup> Case C-140/12, *Brey*, EU:C:2013:565.

<sup>35</sup> Case C-333/13, *Dano*, EU:C:2014:2358.

<sup>36</sup> Case C-67/14, *Alimanovic*, EU:C:2015:597.

<sup>37</sup> Case C-400/12, *M.G.*, EU:C:2014:9.

<sup>38</sup> Case C-165/14, *Rendón Marín*, EU:C:2016:675.

<sup>39</sup> Case C-304/14, *CS*, EU:C:2016:674.

<sup>40</sup> F. Strumia (Fn. 7), p. 433.

<sup>41</sup> Ibid.

## 2. Access to non-contributory cash benefits

This section addresses the right to equal treatment of EU citizens with nationals of the host Member State regarding access to non-contributory cash benefits. In *Brey*,<sup>42</sup> the Court relied, in contrast to subsequent judgments, on the principle of proportionality. The case concerned a German pensioner's application for a compensatory pension supplement, which was refused by the competent Austrian authorities on the grounds that Mr Brey did not have "sufficient resources to establish his lawful residence in Austria".<sup>43</sup> The Court recalled that "the right to freedom of movement is – as a fundamental principle of EU law – the general rule" and stated that "the conditions laid down in Article 7(1)(b) of Directive 2004/38", which refers to a requirement of sufficient resources "must be construed narrowly (...) and in compliance with the limits imposed by EU law and the principle of proportionality (...)".<sup>44</sup>

The ECJ clarified that any automatism provided for by national law is prohibited by EU law<sup>45</sup> and that an assessment of the facts of the individual case and compliance with the principle of proportionality are crucial. Finally, the Court provided a non-exhaustive list of criteria that should be considered by the competent authorities when assessing an economically inactive EU citizen's application for a benefit.<sup>46</sup>

Even though the Court did not refer to the 'fundamental status' formula, it reiterated the notion of financial solidarity that it already mentioned in its 2001 *Grzelczyk* judgment by stating that "Directive 2004/38 thus recognises a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary".<sup>47</sup>

While the Court upheld the requirement of an assessment of the facts of the individual case<sup>48</sup> and a proportionality assessment and thereby prohibited any automatism, the judgment is not as migrant-friendly as it might seem at first glance. O'Brien argues that the Court "closed off suggestions that EU nationals ought to have equal access (...) to special non-contributory

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<sup>42</sup> Case C-140/12, *Brey*, EU:C:2013:565.

<sup>43</sup> *Ibid.*, para. 17.

<sup>44</sup> *Ibid.*, para. 70.

<sup>45</sup> *Ibid.*, para. 77. As to the problems of determining an unreasonable burden see, *H. Verschuere*, "Free Movement or Benefit Tourism: The Unreasonable Burden of Brey", 16 *European Journal of Migration and Law* (2014), p. 171, 172; *M. Dawson and B. de Witte*, "Welfare Policy and Social Inclusion", in: D. Chalmers and A. Arnall (eds.), *The Oxford Handbook of European Union Law*, Oxford, Oxford University Press, 2015, p. 970; *P. Minderhoud*, "Directive 2004/38 and Access to Social Assistance Benefits", in: E. Guild, C. Gortázar Rotaèche and D. Kostakopoulou (eds.), *The Reconceptualization of European Union Citizenship*, Brill, 2013, pp. 218, 219, 223.

<sup>46</sup> Case C-140/12, *Brey*, EU:C:2013:565, para. 78.

<sup>47</sup> Case C-140/12, *Brey*, EU:C:2013:565, para. 72.

<sup>48</sup> *Ibid.*, para. 64.

benefits (...) as part of the legislative compromise that shielded those benefits from exportation”.<sup>49</sup> Moreover, she opines that *Brey* implies that Member States can “subordinate residence rights to the “legitimate interests” of protecting public finances”,<sup>50</sup> an aspect that was certainly prominent in the subsequent *Dano* and *Alimanovic* judgments. Likewise, Davies highlights that the principles established in *Brey* are quite restrictive and do not threaten the public finances of the Member States.<sup>51</sup> Nevertheless, in contrast to the subsequent judgments, which constitute a remarkable deviance in the Court’s approach, the 2013 *Brey* judgment strongly relies on the principle of proportionality.

#### **a. The *Dano* case**

The 2014 *Dano* judgment, by way of contrast, did not even mention the principle of proportionality. The case concerned the Romanian nationals Ms Dano and her son Florin, who had resided in Germany for several years.<sup>52</sup> Ms Dano did not work or seek work, nor was she ever employed throughout the duration of her stay in Germany. She and her son applied for non-contributory cash benefits according to the German Social Code II (*Sozialgesetzbuch II*), which was subsequently refused by the German authorities.

Even though the Court had recourse to the prohibition of discrimination on grounds of nationality,<sup>53</sup> it did not base its reasoning on the equal treatment provision in primary law, but on secondary law by holding that “the principle of non-discrimination, laid down generally in Article 18 TFEU, is given more specific expression in Article 24 of Directive 2004/38”.<sup>54</sup> In a second step, the Court emphasised that Article 24(1) of the Citizenship Directive “provides that all Union citizens residing on the basis of the directive in the territory of the host Member State are to enjoy equal treatment with the nationals of that Member State”<sup>55</sup> and thereby made recourse to the right to equal treatment contingent on the fulfilment of the criteria laid down in secondary law. In Ms Dano’s case, residence on the basis of that Directive meant compliance with the requirements of Article 7 thereof. As Ms Dano was not a worker, self-employed<sup>56</sup> or following a course of study,<sup>57</sup> she had to comply with the criteria contained in Article 7(1)(b) of

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<sup>49</sup> See, C. O’Brien, “Civis Capitalis Sum: Class as the New Guiding Principle of EU Free Movement Rights”, 53 CMLRev. (2016), p. 945.

<sup>50</sup> Ibid.

<sup>51</sup> G. Davies, “Migrant Union Citizens and Social Assistance: Trying to Be Reasonable About Self-Sufficiency”, College of Europe, Research Paper in Law 02/2016, p. 12.

<sup>52</sup> Case C-333/13, *Dano*, EU:C:2014:2358, paras. 35, 36.

<sup>53</sup> Ibid., para. 64.

<sup>54</sup> Ibid., para. 61.

<sup>55</sup> Ibid., para. 68.

<sup>56</sup> Article 7(1)(a) of the Citizenship Directive.

<sup>57</sup> Article 7(1)(c) of the Citizenship Directive.



the Citizenship Directive, which requires sufficient resources and comprehensive sickness insurance cover.<sup>58</sup> The ECJ held that “according to the findings of the referring court the applicants do not have sufficient resources and thus cannot claim a right of residence in the host Member State under Directive 2004/38”.<sup>59</sup> Consequently, the applicants could not rely on the right to equal treatment provided for in Article 24(1) of the Citizenship Directive. The Court concluded that Article 24(1) of the Citizenship Directive, read in conjunction with Article 7(1) thereof, did not preclude national legislation such as that which excluded the applicants from access to these benefits.<sup>60</sup>

Notably, the ECJ did not mention the principle of proportionality and because of this, the ECJ also abstained from assessing the facts of the individual case and balancing the competing interests. This development is remarkable, given that Ms Dano had lived in Germany for several years, where she gave birth to her son in 2009 and given that her sister materially provided for her and her son by accommodating them in her apartment.<sup>61</sup> In the subsequent *Alimanovic* case, the ECJ provided reasons as to why it abstained from undertaking a proportionality test.

## **b. The Alimanovic Case**

Nazifa Alimanovic and her three children are Swedish citizens.<sup>62</sup> In contrast to Ms Dano, Ms Alimanovic and her oldest daughter had been economically active in the host Member State (Germany) before claiming subsistence allowances for the long-term unemployed as well as social allowance for her two minor children. According to the referring court, the benefits claimed were ‘special non-contributory cash benefits’ within the meaning of Article 70(2) of Regulation No 883/2004.<sup>63</sup> The ECJ stated that it “is apparent from the Court’s case-law, such benefits are also covered by the concept of ‘social assistance’ within the meaning of Article 24(2) of Directive 2004/38”.<sup>64</sup>

Ms. Alimanovic, and her oldest daughter, worked for eleven months in Germany. Had they worked for twelve months, they would have retained their status as workers pursuant to Article 7(3)(b) of the Citizenship Directive. Lacking one month of employment, the ECJ relied on Article 7(3)(c) of the Citizenship Directive and noted that Ms Alimanovic and her daughter

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<sup>58</sup> Article 7(1)(b) of the Citizenship Directive.

<sup>59</sup> Case C-333/13, *Dano*, EU:C:2014:2358, para. 81.

<sup>60</sup> *Ibid.*, paras. 82, 83.

<sup>61</sup> *Ibid.*, para. 37.

<sup>62</sup> Case C-67/14, *Alimanovic*, EU:C:2015:597, para. 25.

<sup>63</sup> *Ibid.*, para. 43.

<sup>64</sup> *Ibid.*, para. 44.

retained worker status for at least six months after their last employment had ended.<sup>65</sup> Given that this period had expired, they were barred from claiming unemployment benefits and could only apply for long-term unemployed benefits.

Regarding the question of whether the refusal of these benefits was compliant with EU law, the Court held that it must be determined “whether the principle of equal treatment referred to in Article 24(1) (...) is applicable and, accordingly, whether the Union citizen concerned is lawfully resident on the territory of the host Member State”.<sup>66</sup> Since the six month period referred to in Article 7(3)(c) of the Citizenship Directive had expired in the case of Ms. Alimanovic and her daughter, the second provision, Article 14(4)(b) of the Citizenship Directive, was decisive. Article 14(4)(b) of the Citizenship Directive provides that a Union citizen who entered the territory of the host Member State in order to seek employment there may not be expelled for as long as (s)he can provide evidence that (s)he is continuing to seek employment and has a genuine chance of becoming economically engaged.<sup>67</sup> Despite the fact that EU citizens who can rely on Article 14(4)(b) of the Citizenship Directive have a residence right on the basis of the aforementioned Directive and could therefore, in principle, rely on Article 24(1) of the Citizenship Directive, Article 24(2) of the Citizenship Directive contains derogations to Article 24(1). Accordingly, the Court ruled that Article 24(2) of the Citizenship Directive can be invoked “in order not to grant that citizen the social assistance sought” given that Article 24(2) of the Citizenship Directive explicitly refers to Article 14(4)(b) of the Citizenship Directive.<sup>68</sup> The Court concluded that Union law does not preclude national legislation which excludes EU citizens covered by Article 14(4)(b) of the Citizenship Directive from “entitlement to certain ‘special non-contributory cash benefits’ (...) although those benefits are granted to nationals of the Member State concerned who are in the same situation”.<sup>69</sup>

#### **aa. The principle of proportionality**

The principle of proportionality is a pillar of the *Rechtsstaat* and a general principle of EU law<sup>70</sup> that is codified in Article 5(4) TEU and contained in Protocol (No. 2) on the application of the principles of subsidiarity and proportionality. Under the principle of proportionality a measure must be “suitable for securing the attainment of the objective which it pursues”.<sup>71</sup>

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<sup>65</sup> Ibid., paras. 53-55.

<sup>66</sup> Ibid., para. 51.

<sup>67</sup> Article 14(4)(b) of the Citizenship Directive codified the criterion that was established in Case C-292/89, *Antonissen*, EU:C:1991:80, para. 21.

<sup>68</sup> Case C-67/14, *Alimanovic*, EU:C:2015:597, para. 57.

<sup>69</sup> Ibid., para. 63.

<sup>70</sup> Case C-273/97, *Sirdar*, EU:C:1999:523, para. 26; Case C-343/09, *Afton Chemicals Limited*, EU:C:2010:419, para. 45; P. Craig, *EU Administrative Law*, 2nd edn., Oxford, Oxford University Press, 2012, p. 591.

<sup>71</sup> Case C-55/94, *Gebhard*, EU:C:1995:411, para. 37; Case C-100/01, *Oteiza Olazabal*, EU:C:2002:712, para. 43.

Moreover, the Court has ruled that the measure must be necessary, which means that it must not go beyond what is required in order to attain the objective<sup>72</sup> or that no alternative, equally effective but less intrusive, measure is available – known as the so-called ‘least onerous means test’.<sup>73</sup> The principle of proportionality regulates the exercise of the European Union’s power and aims at preventing the imposition of an undue burden on the addressee of a legislative, executive or judicial act or decisions and at striking a fair balance between competing interests.

While the Court previously required a proportionality test in the context of the Citizenship Directive, it explicitly abstained from conducting a proportionality assessment in *Alimanovic* and allowed for an automatic exclusion to benefits for jobseekers, if they do not retain the status of a worker according to Article 7(3) of the Citizenship Directive. The Court acknowledged that it previously ruled that “Directive 2004/38 requires a Member State to take account of the individual situation of the person concerned before it adopts an expulsion measure or finds that the residence of that person is placing an unreasonable burden on its social assistance system”, but held in *Alimanovic* that no such individual assessment was necessary.<sup>74</sup>

The explanation provided by the ECJ as to why an individual assessment was not necessary relies on several arguments. First, the Court held that “Directive 2004/38, establishing a gradual system as regards the retention of the status of ‘worker’ which seeks to safeguard the right of residence and access to social assistance, itself takes into consideration various factors characterising the individual situation of each applicant for social assistance and, in particular, the duration of the exercise of any economic activity”.<sup>75</sup> In the next paragraph, the Court argued that: “By enabling those concerned to know, without any ambiguity, what their rights and obligations are, the criterion referred to (...) in Article 7(3)(c) of Directive 2004/38, namely a period of six months after the cessation of employment during which the right to social assistance is retained, is consequently such as to guarantee a significant level of legal certainty and transparency in the context of the award of social assistance by way of basic provision, while complying with the principle of proportionality”.<sup>76</sup>

These arguments will be analysed respectively, starting with the last argument that Article 7(3) of the Citizenship Directive 2004/38 complies with the principle of proportionality. Given that the principle of proportionality is a general principle of Union law and given that it

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<sup>72</sup> Ibid.

<sup>73</sup> M. Franzen, in: R. Streinz (ed.), EUV/AEUV Kommentar, 2nd edn., C.H. Beck, 2012, Art. 45, para. 127.

<sup>74</sup> Case C-67/14, *Alimanovic*, EU:C:2015:597, para. 59.

<sup>75</sup> Ibid., para. 60.

<sup>76</sup> Ibid., para. 61.

underpins the Citizenship Directive, as its Preamble and several of its Articles refer to this principle;<sup>77</sup> the Citizenship Directive must therefore comply with the principle of proportionality.

The argument that the Citizenship Directive, in particular Article 7 thereof “itself takes into consideration various factors characterising the individual situation of each applicant for social assistance and, in particular, the duration of the exercise of any economic activity”<sup>78</sup> is startling. Provisions in laws or directives are usually phrased in abstract and general terms in order to cover a variety of situations and a plurality of individuals. The application of the provision to the facts of the individual case, for example by way of an administrative act, is concrete and individual. It is difficult to see how an abstract and general provision can at the same time be concrete and individual.<sup>79</sup>

The final argument advanced by the Court as to why a proportionality assessment was not necessary, was based on legal certainty. The Court held that Article 7(3)(c) of Directive 2004/38 guarantees “a significant level of legal certainty and transparency” by “enabling those concerned to know, without any ambiguity, what their rights and obligations are”.<sup>80</sup>

#### **bb. The principle of legal certainty**

Another cornerstone of the *Rechtsstaat* is the principle of legal certainty. In *Westzucker* the Court referred to the principle of legal certainty as a principle “by which the confidence of persons concerned deserves to be protected (*Vertrauensschutz*)”.<sup>81</sup> This principle comprises the protection of legitimate expectations<sup>82</sup> and non-retroactivity.<sup>83</sup> The Court’s finding that Article 7(3)(c) of Directive 2004/38 guarantees “a significant level of legal certainty and transparency” by “enabling those concerned to know, without any ambiguity, what their rights and obligations are”<sup>84</sup> is not entirely clear.

The first and most obvious option is that the ECJ refers to the applicants for the benefits, namely Ms Alimanovic and her daughter. But would Ms Alimanovic’s and her daughter’s legal certainty be impaired if a proportionality assessment was conducted? If the default position is that Ms Alimanovic is not entitled to the benefit, her legal certainty would not be negatively

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<sup>77</sup> See for example Recital 23 of the Preamble to the Citizenship Directive and Article 27(2) of the Citizenship Directive.

<sup>78</sup> Case C-67/14, *Alimanovic*, EU:C:2015:597, para. 60.

<sup>79</sup> See also, *N. Nic Shuibne*, “What I tell you three times is true: lawful residence and equal treatment after Dano”, 23 *Maastricht Journal of European and Comparative Law* (2016), pp. 922, 923; *A. Iliopoulou-Penot* (Fn. 11), p. 1024.

<sup>80</sup> Case C-67/14, *Alimanovic*, EU:C:2015:597, para. 61.

<sup>81</sup> Case C-1/73, *Westzucker*, EU:C:1973:78, para. 6.

<sup>82</sup> See, Case C-2/75, *Mackprang*, EU:C:1975:66, para. 44.

<sup>83</sup> It does, however, not exclude all possibility of retroactive effect, Case C-88/76, *Société pour l’exportation des sucres SA*, EU:C:1977:61, para. 17.

<sup>84</sup> Case C-67/14, *Alimanovic*, EU:C:2015:597, para. 61.

affected by a balancing process. The balancing process could lead to the conclusion that she is entitled to the benefit due to her links with the host Member State (Germany). This ‘additional test’ might impinge upon the certainty that she is not entitled to receive the benefit, but it would not undermine her trust in the (host) Member State.

The Court’s reference to ‘those concerned’ could also hint at the respective Member State, which would be obliged to pay the benefit to the applicant. The Member State’s certainty would be affected if its obligation to pay the benefit was dependent on the outcome of a balancing process. But legal certainty traditionally refers to the trust of the individual in the continuity of the law and to the individual’s legitimate expectations.<sup>85</sup> Van Meerbeeck rightly remarks that “legal certainty should operate mainly for the benefit of the individual”.<sup>86</sup>

Finally, the notion ‘those concerned’ could refer to the nationals of the host Member State, who might indirectly be obliged to pay the benefit, for example through their tax contributions. This outright exclusion of EU citizens who do not fulfil certain requirements signals to the nationals of the host Member State that they are no longer expected to show a certain degree of financial solidarity with EU citizens from other Member States.

#### **cc. The friction between legal certainty and the principle of proportionality**

Legal certainty and transparency on the one hand and the principle of proportionality on the other are not always reconcilable. Nic Shuibhne rightly points out that a “framework that requires a case-by-case assessments is far from perfect, especially from the perspectives of legal certainty and workability in practice”.<sup>87</sup> Verschueren has criticised the Court’s previous “unreasonable burden assessment” for increasing legal uncertainty and confusion.<sup>88</sup> Similarly, Spaventa points out, with reference to *Förster*<sup>89</sup> and *O. & B.*,<sup>90</sup> that “the case by case assessment – unworkable for either Court or administrators – is discarded in favour of more predictable rights for economically inactive people”.<sup>91</sup>

A case-by-case assessment is indeed a source of insecurity. A casuistic approach makes it not only more difficult for the applicant and his or her lawyer to predict the outcome of the case, but it also makes it more difficult for national courts to bring their judgments in line

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<sup>85</sup> Grzeszick, in: Maunz/Dürig, Grundgesetz-Kommentar, Art. 20, para. 69 (78. EGL Sept. 2016).

<sup>86</sup> J. Van Meerbeeck, “The principle of legal certainty in the case-law of the European Court of Justice: from certainty to trust”, 40 E.L. Rev. (2016), p. 276.

<sup>87</sup> N. Nic Shuibhne (Fn. 2), p. 913.

<sup>88</sup> H. Verschueren (Fn. 45), p. 169; A. Iliopoulou-Penot (Fn. 11), p. 1026, who argues that the unreasonable burden test did not provide meaningful guidance to national authorities.

<sup>89</sup> Case C-158/07, *Förster*, EU:C:2008:630.

<sup>90</sup> Case C-456/12, *O. & B.*, EU:C:2014:135.

<sup>91</sup> E. Spaventa (Fn. 2), p. 208.

with the ECJ's case law. Yet, insecurity regarding the outcome of the balancing process is an inherent feature of the proportionality principle, which in turn is a fundamental principle of EU law. This insecurity has been limited to a certain degree by a codification of the criteria that must be taken into consideration throughout the balancing process<sup>92</sup> and by refining these criteria in the Court's case law.<sup>93</sup> These criteria provide some degree of guidance to the executive and judiciary when balancing the conflicting interests. They can be considered a compromise between the principle of legal certainty and the principle of proportionality as they clarify which considerations play a role in the balancing process and thereby add some degree of legal certainty. Legal certainty could be enhanced even further – without jeopardising the principle of proportionality – by attaching specific weight to the respective criterion, in other words by ranking the different criteria and by identifying criteria that shall have more weight than others. Moreover, Nic Shuibhne rightly argues that an individual assessment “does mediate the ambiguities built into the Directive”.<sup>94</sup>

#### **dd. The Court's approach: a departure from a proportionality test**

The Court's approach in *Alimanovic* does not strike any balance between the principle of legal certainty and the principle of proportionality. It sacrifices the proportionality assessment for the sake of legal certainty.

First, the provisions of the Citizenship Directive, on which the Court relies, do not bar a proportionality assessment. Article 7(3)(c) of the Citizenship Directive, for example, is not conclusive, as it establishes a minimum period for which the status of ‘worker’ is retained, but does not establish a maximum period after which the status must be revoked. It thereby leaves discretion to the national authorities when they are implementing the Directive. This discretion must be exercised in line with the principle of proportionality. Similarly, Article 24(2) of the Citizenship Directive provides that a “Member State shall not be obliged to confer entitlement to social assistance (...)”, but it does not prevent Member States from doing so.

Secondly, the question of whose legal certainty is enhanced is relevant. Ruling out a proportionality assessment in a situation where a proportionality assessment could be potentially beneficial for Ms Alimanovic; however where the lack of a proportionality assessment would be beneficial for the host Member State, this would in turn arouse the

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<sup>92</sup> See for example, the criteria listed in Recital 16 of the Preamble to the Citizenship Directive that are used to determine whether the individual is an unreasonable burden on the social assistance system of the host Member State.

<sup>93</sup> Case C-140/12, *Brey*, EU:C:2013:565, paras. 69, 78.

<sup>94</sup> *N. Nic Shuibhne* (Fn. 2), p. 913.

suspicion that legal certainty is being used to mask a decision that gives precedence to the interests of one party and sidelining the duty to give reasons.

Thirdly, a proportionality assessment might be necessitated by the Charter of Fundamental Rights (hereinafter: CFR or Charter). According to Article 51(1) of the Charter the “provisions of this Charter are addressed to the institutions and bodies of the Union and to the Member States only when they are implementing Union law”. The notion of ‘implementing Union law’ is open to interpretation. In *Åkerberg Fransson*, the Court gave this notion a wide interpretation by stating that “[t]hat article of the Charter thus confirms the Court’s case-law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union”.<sup>95</sup> In the next paragraph, the Court stated that “[t]he Court’s settled case-law indeed states, that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law”.<sup>96</sup> The notion of “all situations governed by Union law” is admittedly wider than the notion of implementation of Union law. Regarding this wider interpretation, Tridimas rightly points out that the judgment ensures conformity between the scope of application of general principles and the Charter rights.<sup>97</sup> According to the Court “fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law”.<sup>98</sup>

The *Alimanovic* situation even fulfils the narrow interpretation contained in Article 51(1) CFR, as the Member State was implementing Union law. As outlined above, the Court found that Ms Alimanovic and her daughter had a right of residence on the basis of Article 14(4)(b) of the Citizenship Directive<sup>99</sup> which had been transposed into German law.<sup>100</sup> By applying this provision, the German authorities implemented Union law as per Article 51(1) of the Charter and, as a consequence, the German authorities were bound by the Charter. Given that Ms Alimanovic gave birth to her three children in Germany and had lived and worked in Germany for some time, the denial of the benefit would have to be assessed for its compatibility with the right to respect for private and family life (Article 7 of the Charter). This in turn would have required an assessment of the facts of the individual case and a proportionality assessment.

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<sup>95</sup> Case C-617/10, *Åkerberg Fransson*, EU:C:2013:280, para. 18.

<sup>96</sup> *Ibid.*, para. 19.

<sup>97</sup> T. Tridimas, “Fundamental Rights, General Principles of EU Law, and the Charter”, 16 Cambridge Yearbook of European Legal Studies (2014), p. 383.

<sup>98</sup> Case C-617/10, *Åkerberg Fransson*, EU:C:2013:280, para. 21.

<sup>99</sup> Case C-67/14, *Alimanovic*, EU:C:2015:597, para. 57. See further, S. Mantu and P. Minderhoud, “Exploring the limits of social solidarity: welfare tourism and EU citizenship”, 2 UNIO – EU law Journal (2016), p. 18.

<sup>100</sup> §2(2) no 1a Freedom of Movement Act/EU (Gesetz über die allgemeine Freizügigkeit von Unionsbürgern) which (then) implemented Article 14(4)(b) of the Citizenship Directive into German law.

Moreover, the application of the Charter would have given the Court the chance to elaborate on Article 34 of the Charter (regarding social security and social assistance).

In sum, the relevant provisions of the Citizenship Directive do not bar a proportionality assessment. Moreover, the Court's reference to legal certainty sidelines an explanation as to why the interests of the host Member State and its population should outweigh the interests of the EU citizen. Finally, an assessment of the facts of the individual case and a proportionality assessment would have been required, at the very least, by the Charter of Fundamental Rights.

### **3. Right of residence of third-country family members upon return to the Union citizen's home Member State**

Another example where the Court abstained from an assessment of the facts of the individual case and a proportionality assessment was the *O & B* case.<sup>101</sup> *O & B* concerned the residence rights of third-country family members upon their return to the Union citizen's home Member State after having exercised free movement rights. Even though the Court had previously addressed return situations in *Eind*<sup>102</sup> and *Singh*<sup>103</sup>, the Court's case law was not codified in Directive 2004/38. In March 2014, the CJEU was asked in *O. & B.* whether the case law resulting from *Singh* and *Eind* was "capable of being applied generally to family members of Union citizens who, having availed themselves of the rights conferred on them by Article 21(1) TFEU, resided in a Member State other than that of which they are nationals, before returning to the Member State of origin".<sup>104</sup> The reason given in *Eind* and *Singh* for not only granting a residence right to the third-country family member in the host Member State, but also in the home Member State of the Union citizen upon return, was based on the consideration that the denial of such a right could discourage Union citizens (in these cases workers) to avail themselves of the freedoms granted by the Treaty if they are not able to continue "on returning to his Member State of origin, a way of family life which may have come into being in the host Member State as a result of marriage or family reunification".<sup>105</sup> Adam and van Elsuwege point to a second underlying logic, namely "that family reunification is key to the migrant's integration in the host society".<sup>106</sup>

In *O. & B.* the Court held that the requirements established by the Citizenship Directive should be applied by analogy.<sup>107</sup> Here again the Court reversed the hierarchy between primary and

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<sup>101</sup> Case C-456/12, *O. & B.*, EU:C:2014:135.

<sup>102</sup> Case C-291/05, *Eind*, EU:C:2007:771.

<sup>103</sup> Case C-370/90, *Singh*, EU:C:1992:296.

<sup>104</sup> Case C-456/12, *O. & B.*, EU:C:2014:135, para. 48.

<sup>105</sup> See, Case C-291/05, *Eind*, EU:C:2007:771, para. 35 and 36.

<sup>106</sup> S. Adam and P. van Elsuwege (Fn. 32), p. 449.

<sup>107</sup> Case C-456/12, *O. & B.*, EU:C:2014:135, para. 50.



secondary EU law. Sarmiento and Sharpston rightly point out that “the Court chose to interpret the Treaty in light of a directive (...) rather than basing itself simply upon a purposive interpretation of the Treaty”.<sup>108</sup> The Court stated that the EU citizen’s residence in the host Member State must have been sufficiently genuine “so as to enable that citizen to create or strengthen family life in that Member State”.<sup>109</sup> For determining the genuineness of residence, the ECJ had recourse to Article 7 of the Citizenship Directive, which specifies the requirements for residence exceeding three months. The Court ruled that “[r]esidence in the host Member State pursuant to and in conformity with the conditions set out in Article 7(1) of that directive is, in principle, evidence of settling there and therefore of the Union citizen’s genuine residence in the host Member State and goes hand in hand with creating and strengthening family life in that Member State”.<sup>110</sup> Residence of up to three months was, by way of contrast, insufficient.

Similar to the reasoning in *Dano* and *Alimanovic* the determinative criteria in *O. & B.* were those contained in Article 7 of the Citizenship Directive. These criteria are certainly conducive to legal certainty, even though the Court did not draw upon the principle of legal certainty in *O. & B.* Another common feature of these cases is the Court’s abstention from both an assessment of the facts of the individual case and a balancing process. The requirements established in *O. & B.*, a minimum duration of residence in the host Member State of three months and the fulfilment of the criteria contained in Article 7 of the Citizenship Directive, do not seem to be disproportionate *per se*. However, it is problematic to abstain from an assessment of the facts of the individual case and a balancing process in those situations where the residence falls short of the minimum duration of three months and/or the fulfilment of the criteria contained in Article 7 of the Citizenship Directive. The automatic exclusion from the possibility to be accompanied by a third-country national family member if the criteria of Article 7 of the Citizenship Directive are not fulfilled, is difficult to reconcile with the principle of proportionality. Situations in which residence in the host Member State is intended to exceed three months, but fails to reach this threshold due to compelling reasons,<sup>111</sup> can still exhibit facts that might lead to the conclusion that the family member of the Union citizen should have a right of residence in the Union citizen’s home Member State. Schoenmaekers and Hoogenboom therefore rightly propose that a period of residence falling short of the three-month criterion must be evaluated on

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<sup>108</sup> D. Sarmiento and E. Sharpston, “European Union Citizenship and Its New Union: Time to Move On?”, in: D. Kochenov (ed.), *EU Citizenship and Federalism, The Role of Rights*, Cambridge, Cambridge University Press, 2017, p. 237.

<sup>109</sup> Case C-456/12, *O. & B.*, EU:C:2014:135, para. 51.

<sup>110</sup> *Ibid.*, para. 53.

<sup>111</sup> For an example see, K. Hamenstädt, “The impact of the duration of lawful residence on the rights of European Union citizens and their third-country family members”, 24 *Maastricht Journal of European and Comparative Law* (2017), p. 72.

its merits.<sup>112</sup> Their suggestion is more likely to achieve balanced results as it takes a broader range of considerations into account and complies with the principle of proportionality.

The more recent judgments discussed in the first two parts of this article, have in common that the Court abstains from a proportionality test and focuses strongly on clear and measurable criteria, which are conducive to legal certainty. Regarding the acquisition of the right of permanent residence (5.) and the protection against expulsion (6.), the Court relies on the umbrella concept of integration (4.), which will subsequently be addressed. The notion of integration conveys “a set of normative values” and can be given different meanings.<sup>113</sup> It is indeterminate and therefore not conducive to legal certainty.

#### 4. The notion of integration

The notion of integration is an inherently open-ended term which is subject to differing interpretations.<sup>114</sup> It serves different functions, both in national<sup>115</sup> and EU law.<sup>116</sup> Two opposing interpretations are relevant for placing the case law that will be introduced in the following sections, in context.

One view considers a secure residence status and equal treatment of migrants with nationals of the respective state as being conducive for integration.<sup>117</sup> The opposite standpoint takes the view that a lack of integration on the part of the migrant is a ground for refusing admission to the country or rejecting access to certain rights.<sup>118</sup> Both perspectives are traceable in the ECJ’s case law<sup>119</sup> and in EU legislation.<sup>120</sup>

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<sup>112</sup> S. Schoenmaekers and A. Hoogenboom, “Singh and Carpenter Revisited: Some Progress but not Final Clarity Case C-456/12 O. v. Minister voor Immigratie, Integratie en Asiel, and Minister voor Immigratie, Integratie en Asiel v. B., Judgment of 12 March 2014, and Case C-457/12 S v. Minister voor Immigratie, Integratie en Asiel, and Minister voor Immigratie, Integratie en Asiel v. C., Judgment of 12 March 2014”, 21 Maastricht Journal of European and Comparative Law (2014), p. 507.

<sup>113</sup> D. Thym, “Towards a Contextual Conception of Social Integration in EU Immigration Law. Comments on *P & S* and *K & A*”, 18 European Journal of Migration and Law (2016), pp. 106, 107.

<sup>114</sup> Ibid., pp. 106-109; K. Groenendijk, “Legal Concepts of Integration in EU Migration Law”, 6 European Journal of Migration and Law (2004), p. 113.

<sup>115</sup> Regarding the notion of integration in national migration law see: J. Eichenhofer, *Begriffe und Konzept der Integration im Aufenthaltsgesetz*, Nomos, 2013.

<sup>116</sup> K. Groenendijk (Fn. 114), p. 113.

<sup>117</sup> K. Groenendijk, “Long-term immigrants and the Council of Europe”, in: E. Guild and P. Minderhoud (eds.), *Security of Residence and Expulsion*, Brill, 2001, p. 7; D. Acosta, *The Long-Term Resident Status as a Subsidiary Form of EU Citizenship, An Analysis of Directive 2003/109*, Brill, 2011, p. 138 (regarding long-term resident third-country nationals).

<sup>118</sup> For further information regarding both perspectives see: D. Thym (Fn. 113), pp. 106, 107.

<sup>119</sup> Case C-389/87, *Echternach*, EU:C:1989:130, para. 20 (representing the perspective that a secure residence status and equal treatment with nationals is conducive to integration); Case C-325/09, *Dias*, EU:C:2011:498, para. 64 (integration as a requirement).

<sup>120</sup> See K. Groenendijk (Fn. 114), p. 114. In this article Groenendijk assesses three selected legal instruments.

In contrast to third-country nationals, who can be subject to integration requirements, for example before acquiring the long-term resident status,<sup>121</sup> integration requirements cannot be imposed on EU citizens.<sup>122</sup> In 2004, Groenendijk rightly noted that “under the current rules on free movement, in the Directive there is no integration requirement whatsoever”.<sup>123</sup> He states that a lack of integration as a ground for refusing admission or certain rights is “absent with respect to Union citizens and their family members”.<sup>124</sup>

The recourse to and interpretation of the notion of integration seems to be part of a more general shift in the case law on EU citizenship. As noted by Thym,<sup>125</sup> there has been a shift in the interpretation of the objectives of the Citizenship Directive. In its *Metock* judgment of 2008, the Court still held that “Directive 2004/38 aims to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on Union citizens by the Treaty”.<sup>126</sup> In *Dano*, by way of contrast, the Court adopted a different stance. Even though the Court did not refer to the directive as a whole, it was held that “Article 7(1)(b) of Directive 2004/38 seeks to prevent economically inactive Union citizens from using the host Member State’s welfare system to fund their means of subsistence”.<sup>127</sup> This shift in the interpretation of the Directive’s objective is also reflected in the Court’s interpretation of the notion of integration used in the Directive.

The Directive adheres to the first interpretation of the notion of integration, which considers a secure residence status conducive for the integration of the Union citizen in the host society. This is demonstrated by Recital 18 of the Preamble to the Citizenship Directive, which addresses the right of permanent residence and provides: “In order to be a genuine vehicle for integration into the society of the host Member State in which the Union citizen resides, the right of permanent residence, once obtained, should not be subject to any conditions”. Permanent residence is consequently considered a vehicle for integration and is not a prerequisite for the acquisition of permanent residence.

The Court, by way of contrast, adopted an interpretation of the notion of integration, which considers integration to be a prerequisite and that the lack of integration can be a reason for refusing protection against expulsion or the acquisition of the right of permanent residence.

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<sup>121</sup> Article 5(2) of Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, O.J. L 16, 23.01.2004, pp. 44.

<sup>122</sup> D. Thym, “Freizügigkeit in Europa als Modell?”, EuR 2011, pp. 489.

<sup>123</sup> K. Groenendijk (Fn. 114), p. 125.

<sup>124</sup> Ibid.

<sup>125</sup> D. Thym (Fn. 14), pp. 254, 255.

<sup>126</sup> Case C-127/08, *Metock*, EU:C:2008:449, para. 82.

<sup>127</sup> Case C-333/13, *Dano*, EU:C:2014:2358, para. 76.

## 5. Right to permanent residence

The requirements for acquiring the right of permanent residence are stipulated in Article 16 of the Citizenship Directive, which provides that “Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there”. Article 16(2) thereof extends this right to the family members of EU citizens.

Already in *Dias* (2011), the Court hinted at an integration objective which lies behind the acquisition of the right of permanent residence. It held that “Article 16(1) of Directive 2004/38 is based not only on territorial and time factors but also on qualitative elements, relating to the level of integration in the host Member State”.<sup>128</sup>

The Court adopted the same approach in *Onuekwere*, which concerned the acquisition of the right of permanent residence by a third-country family member of a Union citizen. The Court, in that case, had to address the question of whether time spent in prison could be taken into account for the calculation of the five-year period. The Court ultimately answered that question in the negative. Moreover, it stated that the continuity of residence was interrupted by the prison term.<sup>129</sup> In reaching those conclusions, the Court held that “the right of permanent residence is a key element in promoting social cohesion and was provided for by that directive in order to strengthen the feeling of Union citizenship”.<sup>130</sup> Furthermore it ruled that “[t]he EU legislature accordingly made the acquisition of the right of permanent residence (...) subject to the integration of the citizen of the Union in the host Member State”.<sup>131</sup> A few paragraphs later, the Court referred to the “the integration requirement which is a precondition of the acquisition of the right of permanent residence”.<sup>132</sup> Thym rightly observes that there is a “conceptual shift away from equal rights as a means for integration, towards an output-oriented assessment that links citizens’ rights to the degree of integration”.<sup>133</sup>

Even though permanent residence requires lawful and continuous residence and which may therefore support the argument that imprisonment interrupts the period of lawful residence, Coutts rightly points out that it does not seem that the time spent in prison or imprisonment were decisive for the Court.<sup>134</sup> Indeed, the ECJ refers to the lack of integration

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<sup>128</sup> Case C-325/09, *Dias*, EU:C:2011:498, para. 64.

<sup>129</sup> Case C-378/12, *Onuekwere*, EU:C:2014:13. For comments on the case see S. Coutts, “Union citizenship as probationary citizenship: *Onuekwere*”, 52 CMLRev. (2015), pp. 531-545.

<sup>130</sup> Case C-378/12 *Onuekwere*, EU:C:2014:13, para. 24.

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*, para. 30.

<sup>133</sup> D. Thym (Fn. 2), p. 38.

<sup>134</sup> See, S. Coutts (Fn. 129), p. 539.

which is demonstrated by the rejection of or “non-compliance by the person concerned with the values expressed by the society of the host Member State in its criminal law”.<sup>135</sup>

An approach that frames the requirement of lawful and continuous residence in the language of integration - whereby integration is understood as compliance with societal norms and values – does not take other forms of integration (such as economic and labour market integration, acquisition of language skills, family ties and the forging of personal ties) into account. Such an approach therefore falls short of a comprehensive assessment of the facts of the individual case. Moreover, the Court assigns the notion of integration a function that differs from the function that the Preamble to the Citizenship Directive assigns to this notion. While the Preamble considers a secure residence status conducive for the migrant’s integration, the Court considers integration a condition for the acquisition of permanent residence and not an aim which is to be achieved by granting the individual the right to permanent residence. This development is not only problematic against the background of the rights of EU citizens and their third-country family members; the Court’s statement that “the integration requirement (...) is a precondition of the acquisition of the right of permanent residence”<sup>136</sup> is also problematic regarding the principle of legal certainty, as the notion of integration is not mentioned in Article 16 of the Citizenship Directive.

## **6. Protection against expulsion**

The Court’s approach to the protection against expulsion follows a similar pattern as the case law on the acquisition of the right of permanent residence insofar as the Court also has recourse to the notion of integration. The ECJ’s case law concerning the limitations of free movement rights on grounds of public policy, public security and public health has been partially codified in the Citizenship Directive, mainly in Articles 27 and 28 thereof. Article 27 of the Citizenship Directive, which is entitled ‘general principles’, refers to the principle of proportionality, the prohibition of invoking public policy or security on economic grounds and the prohibition of basing an expulsion decision on considerations of general prevention, hence the deterrence of other foreigners. Article 28 of the Citizenship Directive, which is entitled ‘protection against expulsion’ refers in its first paragraph to a non-exhaustive list of considerations that must be taken into account when conducting a balancing process between the competing interests and before an expulsion decision can be adopted. Article 28(2) and (3) of the Citizenship Directive provide for an incremental framework of protection against expulsion. Article 28(2) of the Citizenship Directive provides that an EU citizen or third-country

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<sup>135</sup> Case C-378/12, *Onuekwere*, para. 26, 31.

<sup>136</sup> *Ibid.*, para. 30.

national family member, who has the right of permanent residence, which is usually acquired after five years,<sup>137</sup> can only be expelled on serious grounds of public policy or public security. The highest level of protection against expulsion is enjoyed by EU citizens<sup>138</sup> who have resided on the territory of the host Member State for more than ten years<sup>139</sup> and by minor EU citizens.<sup>140</sup> These two groups of EU citizens can only be expelled on imperative grounds of public security. As outlined above, the Court has already reduced the protection against expulsion for EU citizens who are covered by this highest level of protection, by expanding the definition of public security in *Tsakouridis* and *P.I.* respectively.

In the *M.G.*<sup>141</sup> judgment of January 2014, the Court undermined the protection against expulsion even further by having recourse to the concept of integration. *M.G.* was a Portuguese national resident in the UK who was convicted and sentenced to a 21-months prison term.<sup>142</sup> The Secretary of State ordered her to be deported on grounds of public policy and public security. The referring English court asked the ECJ how the ten-year period contained in Article 28(3)(a) of the Citizenship Directive was to be calculated, namely whether the period spent in prison interrupted the period of residence, and whether it makes a difference that the Union citizen accrued ten years of residence prior to their imprisonment.<sup>143</sup>

When addressing the question of whether the period of imprisonment is capable of interrupting the continuity of residence, the Court pointed out that the protection against expulsion in the Citizenship Directive was “based on the degree of integration of the persons concerned in the host Member State”.<sup>144</sup> It held that the “degree of integration (...) is a vital consideration underpinning both the right of permanent residence and the system of protection against expulsion”.<sup>145</sup> It is highly problematic to link the protection against expulsion to the individual’s integration in the host Member State.

Firstly, taking a textual approach, it stands out that, apart from the Preamble to the Citizenship Directive, the notion of integration is only mentioned in Article 28(1) thereof. Article 28(1) of the Citizenship Directive contains a non-exhaustive list of criteria that have to be taken into consideration before an expulsion decision on grounds of public policy or public security can be taken and “contains a short summary of the Strasbourg case-law”.<sup>146</sup> The EU citizen’s

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<sup>137</sup> Article 16 of the Citizenship Directive.

<sup>138</sup> Note that Article 28(3) of the Citizenship Directive does not apply to third-country family members of Union citizens.

<sup>139</sup> Article 28(3)(a) of the Citizenship Directive.

<sup>140</sup> Article 28(3)(b) of the Citizenship Directive.

<sup>141</sup> Case C-400/12, *M.G.*, EU:C:2014:9.

<sup>142</sup> *Ibid.*, para. 13.

<sup>143</sup> *Ibid.*, para. 21.

<sup>144</sup> *Ibid.*, para. 30.

<sup>145</sup> *Ibid.*, para. 32.

<sup>146</sup> *K. Groenendijk* (Fn. 114), p. 125.

integration in the host Member State is one of these considerations and can bar the expulsion of EU citizens,<sup>147</sup> but it is not a requirement that must be fulfilled in order to rely on the protection against expulsion.

Secondly, the notion of integration is inherently vague and open to interpretation. With regard to *Onuekwere*, which was addressed above, Nic Shuibhne points out that the judgment is not “about a duty to integrate *per se*”, but about a duty to integrate properly.<sup>148</sup> Similarly Coutts holds that the Court and the Advocate General are concerned with the “rejection and repudiation of the values of society that breaks and undoes or even reveals a complete absence of integration on the part of the individual concerned”.<sup>149</sup> Linking the protection against expulsion to the individual’s integration, in particular if it is conceived as a “duty to integrate properly”<sup>150</sup> defeats the very purpose of the protection against expulsion. Union citizens who are subject to an expulsion decision because they are considered a threat to public policy or public security due to a criminal conviction, are not usually considered to be ‘properly’ integrated within the host society, especially if integration is understood as compliance “with the values expressed by the society of the host Member State in its criminal law”.<sup>151</sup>

Thirdly, as is discussed elsewhere,<sup>152</sup> Recital 23 of the Preamble to the Citizenship Directive provides that measures taken on grounds of public policy or public security “can seriously harm persons who, (...) have become genuinely integrated into the host Member State”. This sentence demonstrates that genuine integration and posing a threat to public policy or public security are not mutually exclusive. An EU citizen who commits a crime in the host Member State and is therefore subject to expulsion can still at the same time be societally integrated. If, however, integration is understood in terms of “proper integration” and a criminal conviction is synonymous with a lack of integration, then a foreigner who is subject to an expulsion decision can never be regarded as integrated.

Linking the protection against expulsion not only to the duration of residence, but to the fulfilment of an integration requirement, increases the discretion of the Member State to expel EU citizens and thereby undermines the latter’s protection.

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<sup>147</sup> L. Azoulay and S. Coutts, “Restricting Union citizens’ residence rights on ground of public security, Where Union citizenship and the AFSJ meet: P.I.”, 50 CMLRev. (2013), p. 553, 562. C. Murphy, *Immigration, Integration and the Law*, Routledge, 2016, p. 196.

<sup>148</sup> N. Nic Shuibhne (Fn. 2), p. 920.

<sup>149</sup> S. Coutts (Fn. 129), pp. 540, 541.

<sup>150</sup> N. Nic Shuibhne (Fn. 2), p. 920.

<sup>151</sup> Case C-378/12, *Onuekwere*, EU:C:2014:13, para. 26, 31.

<sup>152</sup> K. Hamenstädt (Fn. 111), p. 83.

## II. Concluding remarks

The Court's case law in these four selected areas can roughly be divided into two categories. The first category comprises the second part of this article, that is the case law on EU citizens' access to non-contributory cash benefits and the third part, that is the right of residence of third-country family members upon return to the EU citizen's home Member State. In these two parts, the Court relies on the provisions of the Citizenship Directive, either directly or by analogy, but abstains from an assessment of the facts of the individual case and from conducting a balancing process. In *Alimanovic* the Court justified its abstention from a proportionality assessment by purportedly strengthening legal certainty. Indeed, the perspicuous and measurable criteria, in particular, of Article 7 of the Citizenship Directive are conducive to legal certainty. A proportionality assessment, by way of contrast, does not aid legal certainty, as the outcome of the balancing process between the conflicting interests cannot be easily predicted. The principle of proportionality, however, is a general principle of Union law and underlies the Citizenship Directive. Several arguments have been advanced as to why the reference to legal certainty is unconvincing in the given case and why a proportionality assessment is necessary. The Court's recourse to legal certainty and its abstention from a proportionality assessment respectively, has resulted in an increased margin of discretion for the Member States to refuse non-contributory cash benefits to EU citizens and to deny a right of residence to the third-country family members of Union citizens. It has thereby weakened the legal position of Union citizens.

The second category of the Court's case law is characterised by the judgments regarding the acquisition of permanent residence and the protection against expulsion. In contrast to the first category, these judgments do not seem to be guided by strengthening legal certainty. Quite the opposite is visible, as the Court has recourse to the indefinite and open-ended notion of integration. Despite the fact that the Preamble to the Citizenship Directive considers integration of Union citizens in the host Member State as an aim to be achieved by the 'instrument' of a permanent residence status,<sup>153</sup> the Court linked the protection against expulsion and the acquisition of permanent residence to the integration of the EU citizen and effectively turned it into a condition that must be fulfilled. The notion of integration is mentioned in the legally binding text of the Directive only in the context of expulsion,<sup>154</sup> not as a requirement, but as a consideration that may form a bar to an expulsion. By having recourse to the notion of integration, both with regard to the protection against expulsion and the right of permanent residence, and by imposing it as a requirement the EU citizen must fulfil, the

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<sup>153</sup> See, Recital 18 of the Preamble to the Citizenship Directive.

<sup>154</sup> See, Article 28(1) of the Citizenship Directive.



Court not only undermines legal certainty, but it also weakens the position of EU citizens and increases the discretion of Member States.

The Court's implicit or explicit recourse to the principle of legal certainty in the first category of cases and its recourse to the notion of integration in the second category of cases creates a situation where EU citizenship, or the rights and protections attached thereto, are not fully available for EU citizens who are economically inactive or not sufficiently active or those whom infringe the laws of the host member State. Either EU citizenship cannot be considered a fundamental status or it can be considered a fundamental status, but only for those EU citizens who have the privilege of having sufficient resources and do not happen to fall foul of the law. This development further heightens the exclusion and marginalisation of those EU citizens who are not covered by the fundamental status or do not have full access to the rights linked thereto, which in turn challenges the attainment of the objectives of European integration. The task of finding a solution to these challenges is something which must be performed not only by the Court, but by other institutions and the European society as a whole.